In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 478

ARNOLD ROMANO AND DOMINICK ROMANO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 5504

FRANK SHERBICKI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 5591

CARMINE GUANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a joint trial by jury in the United States District Court for the Southern District of New York,

petitioners were convicted of conspiracy to violate the federal narcotics laws, 21 U.S.C. 174. The crime involved an agreement to import large amounts of heroin from France and to distribute the drugs after their illicit importation. The pertinent facts of the complicated scheme are set forth in sufficient detail in the opinion of the court of appeals (421 F. 2d 792, 796–797; see Pet. App. A 2–3, 7–9 in No. 478).

1. Petitioners Arnold and Dominick Romano and Guanti[1] contend that the trial judge's instructions that the jury had to find a single conspiracy or no conspiracy at all constituted a type of "all or nothing" charge condemned by the Second Circuit in prior cases. This contention is answered in the opinion below, which also relates the evidence from which the jury could reasonably conclude that petitioners were part of a single continuing conspiracy from 1956 to 1960 (421 F. 2d at 796–798; Pet. App. A 16–17 in No. 478).

2. Petitioner Arnold Romano argues that he was denied the right to counsel of his own choosing because the trial judge refused to grant a continuance to permit him to obtain new counsel when it became apparent three days before the scheduled trial date that his retained attorney would be unable to appear. The judge appointed attorney David Markowitz to assist petitioner; he had been petitioner's retained counsel at least through 1967 and had previously asserted his

[1] The petitions of Sherbicki and Guanti are out of time under Rule 22(2) of the Rules of this Court.

readiness to go to trial on the instant charges.[2] The district judge was presented with the task of weighing a variety of competing factors. As the court below properly concluded he reached a balanced decision well within his discretion in denying a continuance. See 421 F. 2d at 795–796.

3. Petitioner Arnold Romano argues that the "failure to demand a speedy trial rule" upon which the court of appeals relied in disposing of his contention in this regard (see 421 F. 2d at 798) has been rejected by the Solicitor General in a brief in opposition filed in the 1967 Term and that it is also inconsistent with a recent expression of views of the American Bar Association; accordingly, he asserts the issue is ripe for examination by this Court (Pet. in No. 478, pp. 16–18).[3] Whatever the desirability of examining this rule in an appropriate factual context[4] (cf. Mr. Justice Brennan concurring

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[2] Petitioner is correct in pointing out (Pet. in No. 478 p. 15, n. 22) that the court below was in error in asserting that Markowitz had declared his preparedness for trial "at least through 1968" rather than in 1966. The confusion is due to the fact that in 1968 Markowitz affirmed that he had been ready back in 1966. This factual misimpression, however, does not detract from the correctness of the court's opinion on this point.

[3] We note that the Second Circuit followed the majority rule in resting its decision on this ground. See, *e.g.*, *Bandy* v. *United States*, 408 F. 2d 518 (C.A. 8); *United States* v. *Jones*, 403 F. 2d 198 (C.A. 7), certiorari denied, 394 U.S. 947; *United States* v. *Maxwell*, 383 F. 2d 437 (C.A. 2), certiorari denied, 389 U.S. 1057. Nor is the majority opinion in *Dickey* v. *Florida*, 398 U.S. 30, inconsistent with the "demand" rule followed by the lower courts. The opinion in *Dickey* shows that petitioner there made repeated demands for a speedy trial. 398 U.S. at 32–33.

Nor did the government in its brief opposing certiorari in the *Maxwell* case (No. 750, Misc., O.T., 1967, certiorari denied, 389

in *Dickey* v. *Florida*, 398 U.S. 30, 39, 48–50), this is not the case. As the opinion of the court below makes clear (see 421 F. 2d at 798) a large portion of the delay was because petitioner was a fugitive and, after his capture, was tried and convicted of bail jumping (in July 1966). He is hardly in a position to argue that he was entitled to a trial on the narcotics charges first. Moreover, at no point has petitioner alleged that any prejudice stemmed from the delay (Pet. in No. 478, p. 19). In these circumstances, no further review is warranted.[4] See *United States* v. *Ewell*, 383 U.S. 116, 120, 122.

4. Petitioner Guanti complains that his co-conspirators' claim of withdrawal from the conspiracy in argument before the judge implied that (a) there was a conspiracy and (b) Guanti was still a member of it. He contends that he was thereby denied the right to "confrontation" by being tried jointly with these co-conspirators, notwithstanding that they did not testify. This argument which was apparently raised for the first time in a petition for rehearing is patently insubstantial.

Guanti also contends that testimony at trial by Hedges (an unindicted co-conspirator) concerning what "others did or said to him" violated his right to

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U.S. 1057) repudiate the demand requirement. The word "request" was used synonymously with "demand", and the government in *Maxwell* maintained that a motion to dismiss for lack of a speedy trial was inappropriate where a prior demand had not been made.

[4] The similar contention by petitioner Sherbicki is equally insubstantial in view of the factual context. Sherbicki's first two motions related to the delay caused by his own failure to appear at trial; his subsequent motions were made after the case had been scheduled for trial (J.A. 163). See also 421 F. 2d at 800.

confrontation (Pet. in No. 5591, p. 3). Hedges' testimony was, however, admissible under the co-conspirator exception to the hearsay and confrontation requirements. Cf. *Dutton* v. *Evans*, No. 10, set down for reargument this Term. Guanti's further contention that his participation in the conspiracy was not proved is answered by the trial record. The evidence showed that he was extensively involved in the criminal scheme as an active member with knowledge of the conspiracy's purposes and membership (*e.g.*, J.A. 100a–102a, 147a–149a, 154a–155a).

It is therefore respectfully submitted that the petitions for writs of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

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